United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

[CORRECTED COPY]

76-1153

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1153

UNITED STATES OF AMERICA,

Appellee,

—v.—

CECIL ROBINSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA ON REHEARING *IN BANC*

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT J. JOSSEN,
AUDREY STRAUSS,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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—v.—

CECIL ROBINSON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA ON REHEARING *IN BANC*

Preliminary Statement

Cecil Robinson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 5, 1976, following a trial before the Honorable Frederick van Pelt Bryan, United States District Judge, and a jury. Following initial consideration of this appeal, a panel of this Court (Oakes, Gurfein, *J.J.*) (Mansfield, *J.*, dissenting) reversed the judgment of conviction and remanded for a new trial on the ground that admission of testimony concerning defendant-appellant's possession of a .38 caliber pistol at the time of his arrest constituted prejudicial error. *United States* v. *Cecil Robinson*, 544 F.2d 611 (2d Cir. 1976). Thereafter, the United States filed a petition for rehearing, with a suggestion for re-

hearing *in banc*. In an order dated February 17, 1977, this Court granted reconsideration *in banc* and directed the filing of additional briefs by both sides.

Indictment 75 Cr. 776 was filed on August 4, 1975 in th ee counts and charged Robinson and Edward Garris with conspiracy to commit bank robbery, bank robbery and armed bank robbery, in violation respectively of Title 18, United States Code, Sections 371, 2113(a) and 2113(d).*

Trial commenced against Robinson ** on January 21, 1976 and concluded on January 30, 1976 *** when he was found guilty on Count Two, the substantive bank robbery charge. Upon the jury's return of a guilty verdict on Count Two, the remaining Counts, One and Three, were dismissed by the court on Robinson's motion, without objection from the Government. On March 5, 1976 Robinson was sentenced to a term of imprisonment of 12 years, subject to the provisions of Title 18, United States Code, Section 4208(a)(2).

Robinson is presently serving his sentence.

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* This indictment superseded Indictment 75 Cr. 535 which named only Allen Simon. Simon pleaded guilty to that indictment and was sentenced by the Honorable Kevin T. Duffy, United States District Judge to 18 years' imprisonment. Subsequently, Simon testified as a government witness against Robinson. In February, 1976, Judge Duffy granted Simon's motion pursuant to Fed. R. Crim. P. 35, without opposition from the Government, and reduced his sentence to 10 years' imprisonment.

** Robinson's co-defendant, Edward Garris, was a fugitive at the time of trial and has not yet been apprehended.

*** Robinson was tried originally in November, 1975 before Judge Duffy and a jury. The jury was unable to reach a verdict, resulting in the declaration of a mistrial. Thereafter, the case was assigned to Judge Bryan for retrial.

Statement of Facts

The Government's Case

In the early morning business hours of May 16, 1975 four armed men robbed a branch of the Bankers Trust Company located at 177 East Broadway, New York, New York, obtaining approximately $10,000 in cash. In the course of the robbery—which lasted a scant five minutes—one teller was shot and wounded. The balance of the bank's employees and customers were terrorized by the all-too-real drama of two robbers standing guard, one with a shot-gun and one with a handgun, while the other two vaulted the tellers' counter and gathered up cash. The Government's evidence established that this holdup was committed by Cecil Robinson, Allen Simon, Edward Garris and a man known only as Karim.

Simon, one of the participants in the robbery, testified as a witness called by the Government. He detailed, with clear recollection, the several days of planning for and actual commission of the robbery by the conspirators. Simon identified the bank robbers beside himself as his long-time friend, appellant Robinson, (also known to him as "Merciful"), Garris, (also known as "A.E." or Allah Equality and also a friend of Robinson), and a fourth man introduced to Simon by Robinson only as "Karim." (Tr. 470, 479, 488, 693, 773-83, 729).*

Simon described the several meetings during which the four men laid plans and prepared for the robbery—plans which broke down in part as the robbery was

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* References to the transcript of the trial are cited as "Tr."; references to Government trial exhibits are cited as "GX".

committed. After reaching initial agreement to commit a robbery, Robinson, Simon and Garris each selected and cased a prospective bank for the holdup. (Tr. 473-78). Thereafter, Robinson proposed the eventual target, the Bankers Trust branch on East Broadway, which was located only two blocks from Gouverneur Hospital where Robinson worked as a laboratory technician. (Tr. 219, 451-53, 482-83). Subsequently, Robinson introduced Karim to Garris and Simon, and Karim was quickly assigned to be the driver of the getaway car since none of the others could drive. (Tr. 488, 521). At Simon's suggestion, the conspirators agreed that to assure success they would carry out the robbery with the use of guns. (Tr. 487-88). Robinson also suggested that he and Karim wear white jackets similar to the kind worn by other hospital employees who frequented the bank so that they would not attract attention when they entered the bank. (Tr. 219, 408, 525). It was further agreed that Garris would cover the bank surveillance camera with a pillowcase to prevent pictures of the robbery, a step which, in a fatal error, he subsequently failed to take. (GX 1; Tr. 524, 526, 554).

The night before the robbery Simon, in the presence of Robinson, Garris and Karim, left a .32 caliber pistol which Simon had obtained in a vacant apartment for which Garris had the key. At the same time, Simon observed a .38 caliber handgun and another weapon which also appeared to him to be a .38 caliber pistol. Later that night, after final discussion about the robbery, the conspirators returned to the apartment where Simon had left his revolver. While Simon waited downstairs Robinson, Garris and Karim went up to the apartment for the expressed purpose of getting the guns. (Tr. 527-29, 534).

On the morning of the bank robbery, May 16, the robbers assembled in a red 1974 Pontiac which had

recently been stolen from Otis Brown, an acquaintance and classmate of Robinson's.* (Tr. 344-54). Karim and Robinson drove up to meet Garris and Simon at Garris' apartment. Thereafter, with Robinson seated in the rear left of the car, the four men drove to Robinson's apartment and then to the bank. During those two trips, Robinson was not wearing the gloves which he later donned for the robbery.

All four robbers entered the bank at approximately 10:00 A.M. Brandishing a sawed-off shotgun, Simon announced the robbery. Garris, armed with a revolver, stood guard by the door. Meanwhile, Robinson, who was wearing a white coat, a hat, a stocking cap under the hat and gloves, vaulted the counter and filled a shopping bag with cash from the tellers' drawers. Similarly, Karim, who also was wearing a white coat, leaped over the counter and helped gather money. Immediately prior to jumping over the counter Karim discharged his gun, wounding a woman teller.

Robinson, while behind the tellers' counter and when vaulting over the counter to leave the bank, was photographed several times by an activated surveillance camera located above the entrance to the bank. The resulting photographs were introduced in evidence (GX 1) and distributed to the jury for its comparison with Robinson's in-court physical appearance.**

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* Originally, the getaway car was to be one owned by Karim. This plan, however, was changed of necessity when Karim purportedly wrecked his own vehicle shortly before the robbery. At that time Robinson and Karim told Simon that Karim would obtain another car. (Tr. 520-21).

** The camera took pictures of Simon, Karim and Robinson, but did not get any shots of Garris, who was standing near the entrance to the bank. None of the bank witnesses, all of whom were petrified because of the shooting and the use of

[Footnote continued on following page]

The four robbers quickly made their getaway in the red 1974 Pontiac which had been stolen from Brown. As they drove away from the vicinity of the bank Robinson, who was seated in the rear of the car, passed his gun over to Garris, as did the others with their weapons.* (Tr. 551-52). Thereafter, the conspirators split up and regrouped later at Garris' apartment where they divided the proceeds of the robbery.

Based upon information supplied to the police by an unidentified passerby who witnessed the robbers' escape, Brown's stolen car was recovered later that same morning. In the abandoned car FBI agents found Robinson's fingerprint on the right rear cigarette lighter panel, and Garris' fingerprint on papers found in the car. (Tr. 294-319, 340, 366).**

The Government's proof also demonstrated through employment records that Robinson was absent from his job at Gouverneur Hospital on the day of the robbery, as well as on days when the holdup was being planned. (Tr.

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the shotgun, could make an identification of the robber with the hat (Robinson). Those witnesses were not asked either in or out of court if they could identify Robinson. The trial court did not permit the Government to elicit testimony from people who had seen Robinson on many occasions that the bank robber in the surveillance pictures (GX 1) was Robinson. (Tr. 756-59).

* Simon did not indicate on which side of the car Robinson was seated.

** The FBI fingerprint expert, on cross-examination, could not say whether or not the latent print lifted on May 16, 1975 had been made a month or two earlier. (Tr. 367-71).

In addition to Simon, the surveillance photographs, and Brown, the Government called as witnesses several bank employees who described the robbery, shooting and the number of participants. (Tr. 219-220, 233, 406, 428-29).

452; GX 6 and 6A). Other witnesses corroborated Simon's testimony that Robinson was known as "Merciful" and that Robinson and Garris were long standing acquaintances. (Tr. 773-84; 785-90).

On June 17, 1975, Simon was arrested by the FBI. Under questioning, after first denying any knowledge of the robbery or its participants, he confessed to the robbery and implicated the three others, including Robinson, as co-participants in the holdup. Simon, however, refused to testify against his long time friends, Robinson and Garris, until after he was sentenced by Judge Duffy.

At the time of Robinson's arrest for the instant offense on July 25, 1975 he was found in possession of a .38 caliber revolver (Tr. 764-65). The seized gun was not itself introduced into evidence.

Defendant's Case

Robinson did not testify, but called several additional bank employees who were present during the robbery. These witnesses testified that the photo spread shown to them by the FBI did not contain Robinson's photograph.*

* The claimed purpose of this testimony was to demonstrate the deficiencies in the FBI's investigation. Apart from the inherent questionable value of such evidence, it is noteworthy that these witnesses were shown the photo spread prior to the time that Simon was arrested and implicated Robinson.

ARGUMENT

POINT I

The Trial Court Did Not Commit Error in Admitting Proof of Robinson's Possession of a .38 Caliber Pistol At the Time of His Arrest.

The Government sought *in banc* reconsideration in this case because the panel's majority decision flies in the face of long-standing authority in this Circuit and would serve to inhibit the proper exercise of the District Court's broad discretion to admit relevant evidence.

The narrow question squarely before the original panel and now before the Court *in banc* is whether Judge Bryan properly balanced the probative value of the gun-at-arrest evidence against its potential prejudicial effect. Before launching into a detailed analysis of these competing considerations, it bears emphasis that appellate review of such evidentiary rulings is both difficult and exceedingly narrow. This Court has recognized on numerous occasions that the exercise of discretion by a trial judge, who has "a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain," *United States* v. *Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), will rarely be reversed on appeal. *United States* v. *Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2071 (2d Cir., Feb. 28, 1977). That principle gives substantial assistance to a proper examination of Judge Bryan's decision and, in great measure, dictates the proper and correct result on this appeal.

As in many bank robbery prosecutions, the basic issue at this trial was the defendant's identity as one of the robbers. The Government's evidence that Robinson was one of the robbers was strong: Allen Simon, an accomplice, testified in great detail to Robinson's participation in the holdup; surveillance photographs clearly depicted defendant behind and vaulting-over the teller's counter; the getaway car had recently been stolen from an acquaintance of Robinson and Robinson's fingerprint was found in the rear of that car after it was abandoned. Simon's testimony implicating Robinson was further independently corroborated by proof that Robinson and Garris were known associates, that Robinson was inexplicably absent from his job at Gouverneur Hospital on the day of the robbery and that, in the commission of the robbery, Robinson and Karim wore white jackets of the type worn in Gouverneur Hospital.* Thus, the Government's case against Robinson was indeed a powerful one.**

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* Although defense counsel elicited on the cross-examination of Simon that the jackets bore the words "Meat Market," (Tr. 578-79), the robbers' use of the white jackets, as depicted in the surveillance photographs, corroborated Simon's testimony that Robinson suggested the use of such jackets. Robinson's employment at Gouverneur Hospital, located only two blocks from the bank, put him in a position to predict that the use of the white jackets would cause the robbers to blend in with the bank's usual scenery.

** Robinson appears to suggest that the absence of eyewitness identifications bars a conclusive finding of guilt. His repeated references to the Government's allegedly "less than airtight case" recklessly understate the compelling effect of Simon's testimony as plainly and convincingly corroborated by circumstantial evidence of defendant's guilt and by the dramatic and clear surveillance photographs which show Robinson's participation in the robbery.

Measured against this backdrop, we come to the gun-at-arrest evidence. Simon had testified that he had seen two .38 caliber revolvers on the night prior to the robbery, that later the same night Garris, Karim and Robinson returned to the location of the weapons to retrieve them, and that immediately after the robbery Robinson and Karim each separately handed guns to Garris in the getaway car. The disputed testimony was that of Detective Clyde Foster, who explained that upon arresting Robinson at Gouverneur Hospital on July 25, 1975, he found in Robinson's possession a .38 caliber revolver with two bullets.

A. Probative Value

Evidence of Robinson's possession of the .38 caliber handgun was clearly relevant for either of two purposes. First, the jury plainly was entitled to infer that this gun was the same as that used by him in the robbery. Second, possession of the .38 caliber gun—even if not the very same one used in the robbery—was convincing proof of access to the implements used in the crime, and therefore was circumstantial evidence of opportunity and ability to commit the underlying offense. Moreover, for either purpose evidence of the gun was further corroboration of Simon's testimony. The panel majority's opinion concluded that "the relevance of the testimony is uncontested," 544 F.2d at 615, but determined that its probative value was "slight", because the majority had difficulty in drawing the inference that the gun seized at arrest was the same as that used in the robbery. The panel did not consider the probative value of the weapon as proof of access and opportunity to commit the offense.

In finding that Robinson's possession of the gun had only slight probative value, the majority's analysis focussed on all possible innocent explanations, such as the possibility that Robinson acquired the .38 after the robbery and the possibility that a different .38 was used in the robbery. This analysis, however, does not assess probative value as much as it attempts to explain the probative value away. In the face of the undisputed evidence that Robinson possessed a handgun on the day of the robbery, that two of the handguns to which he had access were of .38 caliber, and that, some two months later, he was found in possession of a .38 caliber revolver, the inference that the guns were one and the same was compelling. Indeed, as Judge Mansfield forcefully noted in his dissent to the panel majority's opinion, such facts are "sufficiently coincidental to be extraordinary." 544 F.2d at 622. Such a logical inference is the very cornerstone of this Court's decisions in *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970) and *United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975).

The handgun's further significance as evidence of opportunity and ability to commit the crime was not addressed by the panel's majority. It is plain that where a crime has been committed with the use of weapons, proof that one participant later had in his possession a gun which was, at the least similar to that used in the offense proves that he had access to guns and constitutes circumstantial evidence of his ability to commit the underlying offense. Again, such a logical inference is the basis for this Court's decisions in *United States* v. *Wiener*, 534 F.2d 15 (2d Cir. 1976); *United States* v. *Campanile*, *supra*; *United States* v. *Ravich*, *supra*, and *United States*

v. *Baker*, 419 F.2d 83 (2d Cir. 1969), *cert. denied*, 397 U.S. 976 (1970).*

B. Prejudicial Effect

We turn next to consideration of the prejudicial effect of the gun-at-arrest evidence. In the context of weighing whether to admit such evidence the possibility of "prejudice" refers solely to the propensity for *impermissible* inferences that might improperly be drawn from the disputed proof. *See* Fed. R. of Evid. 403.**

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* Indeed, it is difficult to understand how the gun seized at Robinson's arrest can be considered of less evidentiary value than the Lugar pistol that played no role in the bank robbery involved in *Campanile*, than the loaded gun found at the time of defendant's arrest for a narcotics violation in *Wiener*, or than the at least three of six guns in *Ravich* that could not have been used in the bank robbery involved in that case, which were physically displayed to the jury. Yet, in each of these cases such evidence was properly admitted because in each situation, as here, the weaponry was relevant to the questions of identity and opportunity to commit the crime. Far from constituting a "singular" case, 544 F.2d at 613, the admission of the gun evidence here was totally consistent with the understanding of relevance expressed in *Ravich*, *Campanile* and *Wiener*.

** In this regard, Robinson's analysis of the issue is seriously flawed. Robinson repeatedly refers to the "closeness" of the case as the basis for his conclusion of prejudice. While concededly the closeness of the case against a defendant must be considered in determining if the admission of *inadmissible* evidence infected the verdict—a matter which the original panel's majority properly discussed in a separate section of its opinion, 544 F.2d at 619-20—that question is not reached unless or until it is first determined that the possibility of "prejudice," in the sense we discuss above, outweighs relevance, rendering the evidence inadmissible. Robinson's misapprehension as to the proper meaning of prejudice is not uncommon, but serves only to confuse the proper analysis of the evidentiary question raised here.

The possibility of prejudice raised by the original panel's majority was that Robinson might have been convicted by the jury's conclusion that a person with a gun "is a dangerous person who ought to be segregated from society." 544 F.2d at 618-19. This hurriedly drawn conclusion and its application to this case by the majority is flatly inconsistent with *Ravich*, *Campanile* and *Wiener* and does not withstand sound analysis.

First, the possibility of impermissible inferences inherent in the evidence admitted in *Ravich*, *Campanile* and *Wiener* was far greater than in the evidence admitted here. If, as the original panel's majority contended, the prejudicial danger was association of a gun with a person of criminal character, surely there was much greater and more inflammatory prejudice in *Ravich*, where the jury actually saw as well as heard about an arms cache seized in a distant state six weeks after the bank robbery had been committed, and in the gun evidence in *Campanile* and *Wiener*, which had considerably less to do with the crimes charged in those cases than the single .38 caliber pistol found here.

Second, the possibility that the jury here drew improper inferences from this evidence was so slight that a finding to the contrary required far-fetched speculation. In his dissenting opinion, Judge Mansfield plainly and persuasively stated the point as best it can be made:

> "It denigrates the common sense of the average jury to suggest that simply because of a defendant's later possession of a handgun a jury would find him guilty of an earlier bank robbery. A jury is quite capable of distinguishing between the crime of bank robbery and that of possible violation of New York's Sullivan Law. When that jury is then clearly, effectively, and repeatedly instructed by the trial judge that the evidence of

> his later possession of the gun is admitted 'for a very limited purpose . . ., the issue of defendant's identity as one of the robbers,' and told by the court that it may not on the basis of this evidence 'draw any conclusions or inferences or engage in any speculations as to the defendant's character or reputation,' the jury is not going to convict the defendant of robbery merely because he may have possessed a handgun ten weeks after the robbery was committed. Jurors hardly expect evidence in a bank robbery case to be limited to the discreet and delicate niceties that might characterize a highly technical civil suit." 544 F.2d at 623.

Thus, it bears special emphasis that the jury simply could not have convicted Robinson of bank robbery solely because he had a gun in his possession ten weeks later. Manifestly, before Robinson was convicted the jury, of necessity, had to have believed Simon, who unequivocally testified that he, Robinson, and others robbed the bank.*

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* The majority opinion appears haphazardly to assume that exclusion or admission of the gun evidence accounts for the deadlocked jury at the first trial and Robinson's conviction at the re-trial. 544 F.2d at 613, 620. This bland speculation overlooks other significant differences in the proof between the two trials which just as readily, if not more so, explains the difference in result. For example, at the second trial in this case the Government introduced evidence independent of Simon's testimony that Robinson was also known as "Merciful," and that Simon, Garris and Robinson were close acquaintances. Moreover, the Government was not "surprised" by the testimony of Brown—who appeared as a defense witness in the first trial—that Robinson had been a passenger in his car on occasions weeks before the robbery. Accordingly, the prosecutor placed less reliance on the fingerprint evidence—since it was potentially explained away as the result of an earlier trip in the stolen auto—than had been done at the first trial. Similarly, Simon was pressed in his testimony at the second trial to go into more specific detail about the vari-

[Footnote continued on following page]

C. The Balancing Test

Finally, we come to the process of balancing the probative value of the gun evidence against its potential prejudicial effect, an operation in which wide latitude is traditionally and justifiably given to the District Court. *United States* v. *Leonard, supra.* In reaching its conclusion that Judge Bryan had erroneously balanced these competing factors and that reversal was mandated, the original panel's majority necessarily, but unsuccessfully, attempted to distinguish *United States* v. *Ravich, supra.** In *Ravich*, a panel of this Court upheld admission of six .38 caliber guns that were found at the time of defendants' arrest in a distant state, some six weeks after commission of the bank robbery in question. In view of other evidence that the robbers had employed "three pistols and a sawed-off shotgun" in committing the crime, this Court concluded that proof of the subsequent seizure of weapons was of some relevance, although "the evidence connecting the guns seized in Louisiana with those seized in the robbery was rather attenuated." 421 F.2d at 1204. Moreover, although no error was found, the *Ravich* Court observed that the trial judge "might well have" excluded the evidence "in view of the overwhelming evidence that the defendants were the robbers. . . ." 421 F.2d at 1204.** With beguiling logic, the

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ous preparatory meetings, the assembling of guns, and the types of weapons used to commit the robbery. Finally, Judge Bryan properly permitted the Government to introduce Simon's prior consistent statement, given on the day of his arrest, in which he named Robinson as one of the robbers (*see* Fed. R. of Evid. 801(d)(1)(B))—a statement which Judge Duffy excluded from evidence at the first trial.

* The majority's opinion made no mention of this Court's decisions in *United States* v. *Wiener, supra* and *United States* v. *Campanile, supra.*

** The clear and understandable basis of this language is that where evidence is merely cumulative with other evidence of guilt, the scales may be tipped in favor of exclusion. *See* Fed. R. of Evid. 403.

original panel's majority sought to distinguish *Ravich* from the case at bar by reference to the "wealth of direct and circumstantial evidence," other than the seized weaponry, which demonstrated defendant's guilt in *Ravich* (544 F.2d at 617)—the very circumstances that the *Ravich* panel found most disconcerting. Thus, the basis of the original panel majority's distinction appears to be that where other evidence of the defendant's guilt is less than "overwhelming," the probative value of the evidence somehow diminishes. This reasoning is not only logically flawed, but is diametrically opposed to the concern expressed in *Ravich* and truly reflects a fundamental misconception of the balancing test which this Court expects the trial judge to perform.

Ravich, *Campanile* and *Wiener* exact no greater standard than that the trial court carefully weigh the relevance of disputed testimony against the possibility it will create unfair prejudice and arrive at a sensible conclusion. The consistent refusal of this Court to reverse convictions on the basis of an abuse of discretion in that balancing process demonstrates firm support for the wide latitude necessarily accorded to trial courts in evidentiary matters, and implicit recognition that the impact of evidence is not easily calculated on the basis of a cold appellate record. See, *e.g.*, *United States* v. *Cheung Kin Ping*, *supra*; *United States* v. *Rosenwasser*, Dkt. No. 76-1260, slip op. 1972 (2d Cir., Feb. 24, 1977); *United States* v. *Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976); *United States* v. *Panebianco*, 543 F.2d 447, 454 (2d Cir. 1976); *United States* v. *Wiener*, *supra*; *United States* v. *Harvey*, 526 F.2d 529 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976); *United States* v. *Campanile*, *supra*; *United States* v. *Leonard*, *supra*; *United States* v. *Ravich*, *supra*; *United States* v. *Catalano*, 491 F.2d 268, 273-74 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). In this case, Judge Bryan did no less than was expected of him in weighing

the competing interests.* He heard substantial argument on the point, refused to permit the gun itself to be placed before the jury, and he delivered a proper and complete limiting instruction to the jury which guarded against the potential for misuse of such evidence.** *United States* v. *Cheung King Ping, supra,* slip op. 2071; *United States* v. *Rosenwasser, supra,* slip op. 1978. The panel majority's conclusion that the experienced trial judge abused his discretion is no more than a bald-faced conclusion which

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* Robinson's suggestion that Judge Bryan's decision to admit the gun evidence should be judged against Judge Duffy's earlier refusal to do so is simply inapposite. When Judge Duffy decided the question he did not have before him Simon's testimony that two of the three revolvers were of .38 caliber, nor that Robinson had handed over his gun to Garris immediately after the robbery, since Simon had not been asked at the first trial to particularize his testimony on these matters. *Compare,* Transcript of proceedings, Nov. 25, 1975 at 224, *with* Tr. 527-29, 534, 551-52. Thus, Judge Duffy was not aware of this crucial evidence which convincingly demonstrated that Robinson used a .38 caliber gun in the robbery.

** In his charge to the jury, Judge Bryan instructed on the use of the gun testimony as follows:

> "In certain instances evidence may be admitted for a particular, limited purpose only. Now, you have heard testimony about a .38 calibre hand gun which was found when the defendant was arrested on these charges, some two months after the robbery. That testimony was admitted for a very limited purpose. It may be considered only for whatever value, if any, it has on the issue of defendant's identity as one of the robbers, that is, on the question of whether this defendant was the person who committed the crimes charged. You may not draw any conclusions or inferences or engage in any speculations as to the defendant's character or reputation on the basis of this testimony or about anything else other than the narrow thing that I have just mentioned to you. You may consider this evidence solely for the limited purpose I have described and give it such weight, if any, for that purpose as you think it may deserve." (Tr. 1007).

[Footnote continued on following page]

is completely unsupported upon even a cursory examination of the record in this case.*

Finally, we respectfully note that this Court's *in banc* reconsideration of the issue at hand will not be

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The panel majority's and Robinson's criticism of this limiting instruction as "far too cryptic" (544 F.2d at 619) is unfounded. The trial court's charge conformed with similar language expressly approved by this Circuit. *See, e.g., United States* v. *Harvey, supra. See also, United States* v. *Eatherton*, 519 F.2d 603, 612 (1st Cir.), *cert. denied*, 413 U.S. 987 (1975). Indeed, it is hard to see what else could have been included in this instruction. The reference to "identity" obviously allowed the jury to draw the inference that the gun found at arrest was the same as that used in the robbery, or, alternatively, that Robinson had access to the type of weapon used in the commission of the crime.

* We note, as we did in our Petition for Rehearing, that to the extent the panel majority's decision was premised upon appellate reservations that defendant might be innocent, such fears highlight the risk of attempting a review of the evidence without the benefit of the District Court's or the jury's perspective. Thus, for example, the panel's attempt to compare the surveillance photographs with other photographs of Robinson (GX 17) overlooked the District Court's and the jury's ability to make a comparison to Robinson as he sat in the courtroom. Moreover, that kind of review of the evidence flatly contravenes this Court's recent admonition that "we may not substitute our own view of the evidence for that of the jury," *United States* v. *Sears*, 544 F.2d 585, 586 (2d Cir. 1976).

Although defense counsel will often attempt to advance their cause on appeal by suggesting that an innocent man was convicted, the suggestion here was utterly groundless. To suppose that Robinson is an innocent man wrongly convicted requires one to believe not only that his friend Simon framed him but was able to create a false story implicating Robinson immediately upon his arrest on June 17, 1975, that someone with enormous resemblance to him was photographed in the bank, that he was coincidentally absent from work on the day of the robbery, that the robbers happened to use white jackets of the type used at Robinson's place of employment, that Robinson's fingerprint was left in the getaway car on some occasion other than the robbery, and, finally, that Robinson coincidentally had access to and possession of a gun of the caliber used in the hold-up.

without moment in the District Courts of this Circuit. We petitioned for rehearing out of the concern that the panel's majority decision would have significant and grave consequences on evidentiary rulings by the District Courts. Adoption of the panel majority's views would necessarily be perceived as a significant narrowing of the trial courts' discretion to admit relevant evidence and will invite a preference for exclusion of such evidence, rather than a true and reasoned balancing of opposing factors. Of course, when an overburdened District Court judge decides to exclude relevant evidence rather than risk reversal and retrial, the Government has no appeal from that decision, even if the effect on the verdict is fatal. We respectfully urge the Court, *in banc*, to accord Judge Bryan's reasonable determination the deference it deserves and to hold that the admission of this evidence did not constitute an abuse of discretion.

POINT II

Robinson's Other Claims of Error Are All Without Merit.

In reversing the judgment of conviction, the panel's majority relied exclusively upon its finding that the handgun evidence should not have been admitted.* Accordingly, the Government's Petition for Rehearing sought reconsideration only of that issue. On rehearing, Robinson has renewed additional arguments he made to the panel, but which were not reached by the majority opinion.** While the Court appears to have traditionaliy

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* The majority's opinion, without deciding the point, did express concern over the sealing of the juror's note, discussed *infra* at 20-22. *See* 544 F.2d at 620-21.

** Judge Mansfield's dissenting opinion briefly considered and rejected Robinson's claim of error with respect to sealing

[Footnote continued on following page]

returned issues "other than that leading to *in banc* consideration" to the original panel, it may properly reject them immediately since they are "so patently devoid of merit." *United States* v. *Manning*, 448 F.2d 997, 1002 (2d Cir. 1971) (*in banc*). With respect to these points, the Government relies substantially on its arguments previously submitted to the panel in our original brief, and we respectfully refer the *in banc* Court to Points II, III and IV contained therein.

A. Sealing of the Juror's Note and the Subsequent Modified "Allen" Charge.

Robinson argues that the trial court committed error when, two hours after it learned that the jury was deadlocked 11 to 1,* the court sealed a communication from a juror which indicated a "strong reasonable doubt" on her part.** He contends that this error was further compounded by Judge Bryan's decision to give a second modified "Allen" charge the next morning after the note. These claims are completely without merit.

In the context in which the individual juror's note was received by the court, it is plain that to have disclosed its

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of the juror's note and the second modified "Allen" charge given by the court. Judge Mansfield did not mention Robinson's other contentions but concluded that "[f]inding no merit in the appeal, I would affirm." 544 F.2d at 624.

* At 3:25 p.m. on the afternoon of the second day of jury deliberations the jury advised the court in a note that it was deadlocked "11 to 1 for conviction on Count 2." (Court Exhibit 8). Judge Bryan advised counsel of the content of the note, omitting the precise standing of the jury which it had volunteered to the court. Thereafter, Judge Bryan delivered a mild "Allen" charge and the jury returned to its deliberations.

** This note, which was received at 5:45 p.m. on the second day of deliberations, read in whole: "Your Honor, regardless of honest efforts of my co-jurors to persuade me, I am unable to reach a decision without a strong, reasonable doubt. Can you advise me what to do? Mrs. R. Burton." (Court Exhibit 9).

specific message would have placed enormous and unfair pressures on the dissenting juror who had signed the note and would have revealed to counsel the direction of the jury's deliberations which had theretofore not been disclosed. Thus, Judge Bryan properly exercised his discretion in revealing to counsel only the existence of the note and the fact that it dealt with a juror's state of mind. Robinson's counsel was sufficiently apprised from the prior indication of deadlock and the reference to the note's concern with a juror's state of mind to have moved for a mistrial or whatever form of supplementary instructions that he now claims defendant would have sought.* Given Robinson's failure to object to the sealing of the note, and the District Court's justifiable and proper response to the inquiry therein, even if error was committed by the sealing of the note it was surely harmless. *United States* v. *Rodriguez*, 545 F.2d 829 (2d Cir. 1976).

The essence of Robinson's claim really turns on Judge Bryan's decision to give a second modified "Allen" charge. The standard for review of that decision is whether the District Court abused its discretion. Upon receipt of the lone juror's note, Judge Bryan was faced with only two meaningful alternatives: to terminate deliberations and declare a mistrial, or to instruct the jury to continue its deliberations in an effort to reach a verdict. The course

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*The fact that counsel were advised of a communication from a juror dealing with her state of mind makes this case unlike *United States* v. *Rodriguez*, 545 F.2d 829 (2d Cir. 1976), where counsel were not advised of a note from the jury until after the trial judge had already responded to it. In *Rodriguez*, the Court concluded that the response to the note, without prior notification to counsel, was harmless error. *Rodriguez* points to the specific facts that counsel later had an opportunity to object to the court's action, that the jury subsequently requested the reading of testimony, and that the trial judge did not comment on the form or acceptability of the verdict, as specific indications of the lack of prejudice to the defendant. 545 F.2d at 831.

he chose was plainly a sensible and moderate one. Judge Bryan suspended deliberations for the night and did not respond to the juror's inquiry until the next morning; he then delivered an exceedingly brief and ge[illegible]e charge which, in effect, merely instructed the jury to renew its efforts to reach a verdict without violating "individual judgment and your individual conscience," nor "to give up any conscientious views that you hold. . . ." * This instruction, which "was so mild as to border on the innocuous," (544 F.2d at 624) (dissenting opinion), was clearly permissible in view of the length of deliberations that had thus far transpired, and, given the fact that the jury did not reach a verdict until over four hours later, was surely not coercive. *United States* v. *Lee*, 509 F.2d 645, 646 (2d Cir.), *cert. denied*, 422 U.S. 1044 (1975); *United States* v. *Jennings*, 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States* v. *Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969).

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* The full instruction given by Judge Bryan was as follows:

"Last night I requested that you come in this morning again, because I thought this morning perhaps a fresh look at the situation might be useful.

I also got a note from one of your members last evening, just as you were leaving. That person will not be identified, of course, here, and the only response that I can give to that note is to state again for you some of what I stated yesterday afternoon, that is, you should examine the questions submitted to you with candor and with a proper regard for and deference to the opinions of one another: you should listen to one another's views with a disposition to be convinced.

That does not mean that you should give up any conscientious views that you hold, but it is your duty, after full deliberations, to agree upon a verdict, if you can do so without violating your individual judgment and your individual conscience.

That is all I can tell you at this time, so I am going to ask you to make another try this morning, and we will see what happens."

B. The Alleged *Brady* Violation.

Robinson further contends that the Government improperly withheld information that Brown, the owner of the stolen automobile used as the getaway car, had once been introduced to Simon by Robinson in the presence of Garris. Robinson argues that this alleged suppression of information concealed material that would have contradicted the trial testimony of Simon and Brown and that the prosecutor deliberately sought to exploit this nondisclosure in his closing argument to the jury.

We need not dwell long on these frivolous contentions, which are fully answered in the Government's original brief (Point II, at 10-17). It is sufficient to note here that the claimed non-disclosures related to information known to the defendant himself, and, therefore, the Government was not under any duty to disclose such evidence to the defense. *United States* v. *Stewart*, 513 F.2d 957 (2d Cir. 1975); *United States* v. *Brawer*, 496 F.2d 703 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States* v. *Purin*, 486 F.2d 1363 (2d Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); *United States* v. *Pollak*, 474 F.2d 828 (2d Cir. 1973); *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Xydas* v. *United States*, 445 F.2d 660 (D.C. Cir.), *cert. denied*, 404 U.S. 826 (1971); *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970).

Moreover, read in fair context, it is simply beyond cavil that the testimony of neither Brown nor Simon would have been seriously contradicted by evidence that, on a prior occasion, Simon had been introduced by Robinson to Brown, under a different name, and that this meeting had absolutely nothing to do with the automobile which was later stolen from Brown. The prose-

cu or's closing argument on the matter of the getaway car made only the obvious and relevant point that of the four conspirators Robinson was in the best position to know about and arrange for the availability of Brown's car. The prosecutor's awareness of these disputed matters simply would not have affected the substance of this argument to the jury.* Finally, any arguable prejudice to Robinson occasioned by his failure during trial to employ information already known to him was dissipated by the submission to the jury during its deliberations, by stipulation, of those facts upon which Robinson now relies.**

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* When presented with this issue by Robinson's motion for a mistrial during the jury's deliberations, Judge Bryan observed, "I see no *Brady* questions here at all." (Tr. 1028). The District Court promptly denied Robinson's motion for a mistrial.

** Robinson's final claim with respect to alleged improprieties in the prosecutor's summation is patently without merit. The prosecutor's uncompleted reference to the absence of an alibi in this case was an attempted comment on no more than the fact that Robinson's employment records showed him to have been absent from work on the day of the robbery. In any event, any conceivable prejudice to Robinson from this innocuous comment—which was interrupted by defense counsel's objection—was promptly cured by the trial court's speedy enjoiner to the jury to disregard the remark. *See* Government's original Brief, Point III, at 17-20.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT J. JOSSEN,
AUDREY STRAUSS,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18 day of March, 1977 he served ~~a copy~~ of the within corrected brief by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
351 Broadway
New York NY 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this

18 day of March 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977